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In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 379

G. W. DANFORTH, *Petitioner*

v.

THE UNITED STATES

On Petition for a Writ of Certiorari to the United States Court of Claims

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (R. 5-8) is not yet reported.

JURISDICTION

The judgment of the Court of Claims (R. 8) was entered on June 3, 1952. Petitioner's motion for a new trial, seasonably filed, was denied on July 15, 1952 (R. 9). The petition for a writ of cer-

tiorari was filed on October 6, 1952. The jurisdiction of this Court is presumably invoked under 28 U.S.C. 1255 (1).

QUESTION PRESENTED

Whether the Court of Claims correctly omitted "proceed time," in reliance on Navy regulations, in computing petitioner's length of service under the statutes fixing his retired pay as a naval officer.

STATUTES INVOLVED

The pertinent parts of the statutes involved are set forth in the Appendix, *infra,* pp. 7-9.

STATEMENT

This is an action by a retired naval officer for retired pay. Petitioner served as an officer in the Navy from 1885 until 1899, when he was retired for physical disability (R. 1). He was subsequently recalled to active duty several times, pursuant to law, his last tour of duty ending in 1919 (R. 5-6). At that time he was a Lieutenant Commander (R. 2).

Retired pay is currently governed by the Career Compensation Act of 1949, 63 Stat. 802, 37 U.S.C. (Supp. V) 281, 311, *infra,* pp. 7-8. Under one of the options given to the petitioner by that statute, he elected to continue receiving the retired pay granted him by former law. Under the former law, retired pay was computed as a percentage of a base pay fixed, according to rank, in increasing

"periods." See *infra*, pp. 8-9. Lieutenant Commanders with twenty-three years or more of service fell within a higher period than those with less service. The question here was whether petitioner had served twenty-three years.

For a number of years the Navy had been paying petitioner on the basis of twenty-three years' service, but it discovered, as a result of a recheck occasioned by enactment of the 1949 law, an error in its computations. This error concerned the allowance of so-called "proceed time"—the time between the receipt of orders recalling petitioner to active duty on various occasions and the time of departure for the active duty station.

The Navy, relying on Bureau of Naval Personnel Manual, Article C-5315(1)(g) (See R. 7), held that proceed time was not allowable in computing petitioner's years of service, with the result that his total service fell a few days short of twenty-three years. His retired pay was accordingly reduced, as to future installments, and he brought this action for the difference. The United States answered (R. 3-4), and both parties moved for summary judgment (R. 4). The court below upheld the Navy's administrative determination, relying on the cited regulation, which it held was not inconsistent with law and therefore was conclusive.

ARGUMENT

The issue presented by this case is too narrow to warrant review by this Court,[1] and, in addition, the decision of the court below is clearly correct.

Article C-5315(1)(g), Bureau of Naval Personnel Manual, on which the court below relied, provides: "Retired and reserve officers are not entitled to proceed time when ordered to active duty or when proceeding to their homes upon release from active duty." This language applies precisely to this case. "Proceed time" is the time between the receipt of orders recalling to active duty and the time necessary for departure in order to reach the active duty station at the required time. The quoted regulation interprets the statutory provision for allowable service of retired officers recalled to duty in conformity with a similar interpretation as to reserve officers by the Comptroller General. 20 Comp. Gen. 845. The latter provides that allowable service begins at the time necessary for departure over the shortest usually travelled route, as determined from standard time tables and the like.[2]

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[1] Even as to retired naval officers the inclusion of "proceed time" would be important only in the very rare case, such as this, in which it would put the officer in a different pay period (*infra*, p. 8).

[2] Petitioner also contends that the standard times allowed for travel were inadequate under actual conditions. But conceding his maximum claims on this point would not increase the aggregate of his service to twenty-three years (R. 6). On the other hand, if he is right as to proceed time, his service aggregates more than twenty-three years without reference to travel time. Hence, only the former issue is material.

The regulation may be regarded as applying the general terms of the pay statute, *infra*, pp. 8-9, to a specific class of cases. The time to be included in computing length of service as to retired officers is not defined in the statute, and parallel provisions of analogous statutes are not cast in terms of the kind of question presented here. We think that the regulation was well within the power of the Secretary of the Navy to promulgate. Cf. *United States* v. *Philbrick*, 120 U.S. 52, 58-59.

The Court of Claims held that the regulation, being within the Secretary's power, was conclusive. We think, as just noted, that this view was correct. Moreover, even in the absence of the regulation, proper interpretation of the statute would require the same result. This construction embodies the rationale that active duty for pay purposes ought not to begin until it is reasonably necessary for the officer to abandon his civilian occupation, particularly where, as frequently occurred here, the retired officer could be recalled to active duty only with his consent.

Petitioner complains that the regulation did not exist when he retired. But the regulation interprets the general terms of the retirement statute in a specific area properly the subject of regulations, and the fact that it was not promulgated until after completion of petitioner's active duty is therefore immaterial. *Helvering* v. *Reynolds*, 313 U.S. 428, 432-433. No question of a retroactive

regulation is involved. The regulation was applied only to future payments. Indeed, a claim for a refund of overpayments, made during a period admittedly subsequent to its promulgation, was dropped. Petitioner would have had no vested right to the retired pay first granted, even if it had not been awarded by mistake. See *Lynch* v. *United States,* 292 U.S. 571, 576-577, and cases cited.[3]

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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DECEMBER, 1952.

[3] 5 Comp. Gen. 207, cited by petitioner, is not contrary to the decision below; it deals with travel between duty stations of personnel in an active status, not with recall from retired to active status.

APPENDIX

The pertinent provisions of the Career Compensation Act of 1949, 63 Stat. 802, 37 U.S.C. (Supp. V) 281, 311, are as follows:

SEC. 411. Pursuant to such regulations as the President may prescribe, (1) any member or former member of the uniformed services heretofore retired by reason of physical disability and now receiving or entitled to receive retired or retirement pay * * * may elect within the five-year period following the effective date of this title, (A) to qualify for disability retirement pay under the provisions of this Act * * * or (B) to receive retired pay or retirement pay computed by one of the two methods contained in section 511 of this Act: * * *.

* * * * *

SEC. 511. On and after the effective date of this section (1) members of the uniformed services heretofore retired for reasons other than for physical disability, * * * shall be entitled to receive retired pay, retirement pay, retainer pay, or equivalent pay, in the amount whichever is the greater, computed by one of the following methods: (a) The monthly retired pay, retainer pay, or equivalent pay in the amount authorized for such members and former members by provisions of law in effect

on the day immediately preceding the date of enactment of this Act, or (b) * * *.

The previous retirement law (Act of June 10, 1922, c. 212, 42 Stat. 625, 632) read in pertinent part as follows:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That, beginning July 1, 1922, for the purpose of computing the annual pay of the commissioned officers * * * of the Navy below the grade of rear admiral, * * * pay periods are prescribed, and the base pay for each is fixed as follows:
>
> The first period, $1,500; the second period, $2,000; the third period, $2,400; the fourth period, $3,000; the fifth period, $3,500; and the sixth period, $4,000.
>
> * * * * *
>
> The pay of the fifth period shall be paid to * * * lieutenant commanders of the Navy, and officers of corresponding grade who have completed twenty-three years' service: * * *.
>
> The pay of the fourth period shall be paid to * * * lieutenant commanders of the Navy, and officers of corresponding grade who have completed fourteen years' service, * * *.
>
> * * * * *

SEC. 17. That on and after July 1, 1922, retired officers and warrant officers shall have their retired pay, or equivalent pay, computed as now authorized by law on the basis of pay provided in this Act: * * *.

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